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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-6257

TROY LEON GREGG,

Petitioner,

v.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the Supreme Court of Georgia affirming Petitioner's conviction of two counts of murder and two counts of armed robbery and affirming the sentence of death for the two counts of murder is reported at 233 Ga. 117 (1974) (A. 2). The oral opinion of the Superior Court of Gwinnett County sentencing Petitioner to die is unreported, and appears at R. 490.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), the Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Georgia was entered on October 17, 1974 (A. 2). The Petition for Certiorari was filed on March 27, 1975, pursuant to an order extending the time for filing the Petition signed by Mr. Justice Powell, Associate Justice of this Court, on February 5, 1975. The Petition for Certiorari was granted on January 22, 1976 (A. 25).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines, imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the Code of Georgia in effect at the relevant times hereto (because of length, the statutory provisions are printed in the Appendix and only the citations are contained in this section):

(A) Ga. Code Ann. § 26-1101 (Ga. Laws 1968, pp. 1249, 1276);
(B) Ga. Code Ann. § 26-1902 (Ga. Laws 1969, p. 810);

(C) Ga. Code Ann. § 26-3102 (Ga. Laws 1973, pp. 159, 170);
(D) Ga. Code Ann. § 27-2302 (Ga. Laws 1963, pp. 122, 123);
(E) Ga. Code Ann. § 27-2514 (Ga. Laws 1973, pp. 159, 171);
(F) Ga. Code Ann. § 27-2534.1 (Ga. Laws 1973, pp. 159, 163);
(G) Ga. Code Ann. § 27-2537 (Ga. Laws 1973, pp. 159, 165);
(H) Georgia Laws 1973, p. 162, Act No. 74;
(I) Georgia Laws 1973, p. 171, Act No. 74.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentences of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Certiorari has been granted in this case to review the judgment of the Supreme Court of Georgia entered on October 17, 1974, affirming petitioner's two death sentences for the offenses of murder while setting aside and remanding for resentencing petitioner's two death sentences for the offenses of armed robbery. Petitioner, TROY LEON GREGG, was sentenced to die on February 7, 1974, in the Gwinnett County Superior Court of Georgia, upon convictions for the murder and armed robberies of Fred Edward Simmons and Bob Durwood Moore.

On November 21, 1973, petitioner and a traveling companion by the name of Floyd Ralford ("Sam") Allen were hitchhiking north on the Florida Turnpike when they were picked up by Fred Edward Simmons and Bob Durwood ("Tex") Moore. Subsequently, the automobile in which the four men were traveling broke down. Simmons, the owner of the automobile, then summoned a Florida Highway Patrolman to drive Moore and himself to a local used car dealer, where Simmons purchased a 1960 red and white Pontiac. Simmons and Moore then reunited with petitioner and Allen and resumed their journey northward.

At the intersection of I-10 and I-75 in Florida, another hitchhiker, Dennis Weaver, was picked up. Weaver rode in the automobile until approximately 11:00 P.M., the night of November 21, where he was let out of the car at the intersection of I-85 and North Druid Hills Road in Atlanta. Petitioner drove while Weaver was in the car as both Moore and Simmons were both drinking heavily. Weaver testified at trial that no fighting words were exchanged by any of the men while he was present.

The four men continued traveling in a northerly direction on I-85 to its intersection with Georgia Highway 20 in Gwinnett County, where the car was stopped so as to allow Simmons and Moore the opportunity to urinate. The bodies of Simmons and Moore were found near this intersection the following morning. Each victim's death was determined to have been caused by gunshort wounds, a medical examiner for the State testifying that Simmons had been shot in the right corner of the right eye in the region of the temple (R. 97) and Moore had been shot once in the right cheek of the face and once in the rear of his head. (R. 92).

After reading about the alleged murders in an Atlanta paper on November 23, Weaver contacted the Gwinnett County Police Department, told them about his travels with the victims, gave descriptions of petitioner Allen and the make and color of the automobile, and indicated that he thought the projected destination was Asheville, North Carolina. Based on this information, Gwinnett County Police broadcast a wanted description for the car and suspects over the National Crime Information Center teletype. That message led to the subsequent arrest of petitioner and Allen in Asheville on November 24. At the time of arrest, petitioner was driving a 1960 red and white Pontiac, which car was subsequently determined to be the one that Simmons had previously purchased.

Petitioner was placed under arrest on the ground that he was "wanted for investigation in Gwinnett County, possibly on a murder case." (R. 165). No criminal charges were filed against petitioner at this time. A "shake down" search was then conducted, and a weapon later identified as the murder weapon was recovered, along with approximately $107.00 in cash, from the person of petitioner. A subsequent search of the car produced a bill of sale of the car to Simmons and some old clothes, and a search of the motel room where petitioner was staying turned up a stereo tape outfit and a car stereo player.

When the car was stopped at 3:00 P.M., petitioner was given the Miranda warning, and he thereafter signed a written waiver of his rights at 3:17 P.M. (R. 516). Petitioner was held at the police headquarters in Asheville from this time to approximately 9:30 P.M., at which time he was turned over to the Gwinnett County Police. From the time petitioner was placed under

arrest to the time the Gwinnett Police arrived in Asheville, no interrogation of petitioner took place. (R. 180). At the prompting of Gwinnett County authorities, petitioner made a statement at approximately 11:00 P.M. that was reduced to writing and signed by him. The statement was exculpatory in nature; although petitioner admitted shooting Simmons and Moore, he claimed to have done the shooting in self-defense. (R. 282). In this statement, petitioner further admitted taking four to five hundred dollars from the bodies after the shooting. (R. 283). The Miranda warnings were not repeated to petitioner before he made this statement; in fact, they were never given to petitioner after being initially administered to him upon his arrest.

After making his statement, petitioner then returned to the lobby of the police station where he allegedly made the incriminating statement, "By God, I wanted them dead" in response to a question from Asheville Detective William Gibson as to "why he shot those people." (R. 379). This statement was introduced at trial in rebuttal to petitioner's trial testimony that he had not meant to kill Moore and Simmons.

At approximately 1:00 A.M. the morning of November 25, petitioner was released to the custody of the Gwinnett County Police and was transported by automobile back to Lawrenceville, Georgia. Petitioner was handcuffed during the return trip, which lasted about four hours. (R. 284). In the automobile with petitioner during the return trip were the District Attorney of Gwinnett County, who was in the back seat with petitioner, Detective Blannott and Lt. Morris, both of the Gwinnett County Police Department. (R. 284). Following this car was the 1960 Pontiac, in which Sam Allen rode, along with Police Chief Crunkleton and

Sergeant Mills of the Gwinnett County Police Department, James Burton of the District Attorney's Office of Gwinnett County, and Major Lawler of the Asheville Police Department. (R. 285).

On returning to Georgia, the two cars went to the intersection of Georgia 20 and I-85 and stopped. The time was approximately 5:00 A.M., and the cars were stopped at the scene of the crime for the express purpose of reconstructing events. (R. 290). Everyone got out, and Allen, (who was subsequently allowed to enter a guilty plea to two counts of armed robbery, received concurrent sentences of 10 years imprisonment and 10 years probation and did not testify against petitioner at trial) in the presence of petitioner and in response to a question from Detective Blannott, accused petitioner of shooting the victims without provocation and for the sole purpose of robbing them. Detective Blannott testified as to this statement at trial. (R. 287). At the prompting of Chief Crunkleton, petitioner allegedly made a confession of the crimes at the scene (R. 287), although petitioner subsequently refused to sign a writing that set forth this alleged confession. (R. 288).

Petitioner was tried simultaneously for the murders and armed robberies of Moore and Simmons. Petitioner testified under oath in his own defense, the testimony being similar to his earlier signed statement. (R. 320). At the conclusion of the evidence, the trial court charged the jury that it could find him either guilty or not guilty of the two charges of murder, and of the two charges of armed robbery. The jury found petitioner guilty of all four charges.

A sentencing hearing was then held, at which neither the State nor petitioner introduced any evidence. The

trial court charged the jury that it could decide to recommend a death sentence for murder if it found:

> "One – That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to wit, the armed robbery of Fred Edward Simmons and Bob Durwood Moore.
>
> Two – That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> Three – The offense of murder was outrageously and wantonly vile, horrible, and inhuman, in that they involved the depravity of the mind of the defendant." (R. 478, 479).

The jury was further instructed that it could decide to recommend a death sentence for armed robbery if it found:

> "That the offense of armed robbery was committed while the offender was engaged in the commission of two capital felonies, to wit, the murders of Fred Edward Simmons and Bob Durwood Moore or that the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in the indictment, or three, that the offense of armed robbery was outrageously and wantonly vile, horrible and inhuman in that they involved the depravity of the mind of the defendant." (R. 479).

The jury recommended death on each of the four counts. The "aggravating circumstances" found by the jury to justify its death verdict for the two counts of murder were:

> "One – offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to wit: the armed robbery of Fred Edward Simmons and Bob Durwood Moore. Two, the offender committed the offense of murder for the purpose of receiving money and the automobile described in . . . . [the two indictments]." (R. 483, 484).

The "aggravating circumstances" found by the jury to justify its death verdict for the two counts of armed robbery were:

> "One – the offense of armed robbery was committed while the offender was engaged in the commission of two capital felonies, to wit: the murders of Fred Edward Simmons and Bob Durwood Moore. Two – the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in . . . [the two indictments]." (R. 484, 485).

The trial court thereupon sentenced petitioner to die.

On October 17, 1974, the Georgia Supreme Court affirmed petitioner's convictions and the two death sentences for the offenses of murder while setting aside and remanding for resentencing petitioner's two death sentences for the offenses of armed robbery. One Justice concurred specially, while one Justice dissented on the ground that the Georgia capital punishment statute was unconstitutional. The Court denied rehearing on October 29, 1974, with one Justice dissenting.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On appeal to the Supreme Court of Georgia, Petitioner's Enumeration of Error Number 3 asserted that:

"The lower Court erred in submitting to the jury the issue of punishment by death in that punishment by death constitutes cruel and inhumane punishment contrary to the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States."

The Supreme Court of Georgia explicitly rejected this contention and sustained the constitutionality of Petitioner's two death sentences for the crimes of murder, citing its prior decisions in *Coley v. State*, 231 Ga. 829 (1974); *House v. State*, 232 Ga. 140 (1974); and *Eberheart v. State*, 232 Ga. 247 (1974). (A. 11).

SUMMARY OF ARGUMENT

I.

While setting forth certain "standards" governing the imposition of the death penalty for capital crimes, the Georgia capital punishment statute involves and contains a series of uncontrolled discretionary judgments that operate to spare the lives of some defendants while others in similar circumstances are sentenced to die. As administered through such a system, the penalty of death is a cruel and unusual punishment because it has fallen in this case, and will inevitably fall arbitarily upon the isolated defendant, isolated in the sense that he failed to arouse the conscience of one of many participants in the criminal justice process who have explicit or disguised power to save his life.

II.

The punishment of death inflicted in this manner also violates the Eighth Amendment because it is excessive and affronts the principle of human worth embodied in the prohibition of cruel and unusual punishments. No legitimate penal purpose of the State justifies the extreme cruelty of extinguishing human life; and this is in fact the verdict of Twentieth Century American History upon the death penalty. Repudiated in general application, it is tolerated only when imposed upon a random few. But the Eighth Amendment stands to assure that irregular and arbitrary exceptions are not made to the limitations imposed by contemporary standards of decency upon the State's power to punish.

ARGUMENT

I.

THE PERPETUATION OF ARBITRARY SELECTIVITY UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTE.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and its companion cases, this Court ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-240. Because *Furman* and one of its companion cases[1] arose from the State of Georgia, the *Furman* decision effectively invalidated the capital punishment laws of Georgia then in existence.

[1] *Jackson v. Georgia* (No. 69-5030).

In response to *Furman*, the Georgia legislature passed, and the Governor of Georgia signed into law on March 28, 1973 a new capital punishment statute for Georgia,[2] and it is under the new statute that Petitioner has been condemned to die. The question presented here is whether the modifications to the capital punishment statute wrought by the Georgia legislature are substantial enough to meet the minimum requirement of *Furman v. Georgia* – that the most extreme penalty known to contemporary man not be imposed arbitrarily.

The arbitrary infliction of death which this Court condemned in *Furman* and companion cases arose from various procedures whereby juries (or judges) were given the option to sentence convicted capital offenders to life (or term) imprisonment or death.[3] Certainly *Furman* and the Eighth Amendment are to be extended beyond the specific procedures invalidated in *Furman* so as to forbid *any* arbitrarily selective imposition of the "unique penalty" of death,[4] whatever the source or mechanism of the arbitrariness. The particular *method* of selecting some men to die while others in like cases live with "no meaningful basis for distinguishing" among them[5] cannot be thought constitutionally decisive. For the Federal Constitution is not ordinarily concerned with the forms of state procedure, but with

[2]Ga. Laws, 1973, pp. 159-172, Act No. 74.

[3]*See McGautha v. California*, 402 U.S. 183, 197-203 (1971).

[4]*Furman v. Georgia, Supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

[5]*Furman v. Georgia, Supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

their result. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973); *Mempa v. Rhay*, 389 U.S. 128, 135-137 (1967); *Jackson v. Denno*, 378 U.S. 368, 391 (n. 19) (1964). It "nullifies sophisticated as well as simple-minded modes" of producing unconstitutional consequences. *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Federal constitutional guarantees cannot – as Justice Holmes wrote in another Context – "be evaded by attempting a distinction" of form without a difference in substance. *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

The statutory modifications of 1973 represent an attempt by the Georgia legislature to avoid the Constitutional infirmities which beset Georgia's previous capital punishment laws. The approach adopted by the legislature was to attack the most obvious flaw of the prior procedure, that of standardless discretion in sentencing, by providing for a separate sentencing stage in the criminal process and by setting forth in the statute certain "standards" governing the imposition of the death penalty for capital crimes. Yet the sentencing stage is only one of the many stages in the criminal process subject to unrestrained and arbitrary discretion, as will be developed *infra*. To deal only with one stage in the process while ignoring the others does not reduce the arbitrariness and unpredictability in the infliction of the death penalty in any meaningful sense.

In addition to ignoring the problem of standardless discretion and arbitariness in stages other than that of sentencing, the statutory modifications of 1973 contain sentencing standards that are so nebulous and overbroad in scope as to be effectively no standards at all. As will be developed *infra*, these standards amount to nothing more than a codification of the standardless discretion

in sentencing found in the capital punishment laws that were invalidated by this Court in *Furman*. The statutory modification of 1973 notwithstanding, death sentences are still "wantonly and freakishly imposed"[6] in Georgia, the the modifications provide "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." *Id.*, at 313 (Mr. Justice White, concurring).

The new Georgia Law provides a bifurcated trial for the administration of the death penalty for, *inter alia*, murder and armed robbery. *See Coley v. State*, 231 Ga. 829 (1974). After the jury or judge returns a verdict or finding of guilty or after a plea of guilty to one of these crimes, a sentencing hearing is conducted before the jury or judge, and at this hearing, "the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of such prior convictions and pleas." Ga. Law 1973, p. 162, Act No. 74.[7] The State may present only such evidence in aggravation as it has made known to the defendant.

The judge is to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and . . . statutory aggravating circumstances which

[6] *Furman v. Georgia, Supra*, at 310 (Mr. Justice Stewart, concurring).

[7] This section was modified in certain minor respects by Ga. Laws, 1974, p. 355-358, Act No. 854, which also provided that the section would be designated Ga. Code Ann. § 27-2503.

may be supported by the evidence." Ga. Code Ann. § 27-2534.1(b). The "statutory aggravating circumstances" for which the death penalty may be imposed in murder and armed robbery cases are:

> "(1) The offense of murder . . . [or] armed robbery . . . was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who had a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder . . . [or] armed robbery . . . was "committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder [or] armed robbery . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender, committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney, or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
>
> (7) The offense of murder . . . [or armed robbery] . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture,

depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, or himself or another."

Ibid. What, if any, additional "aggravating circumstances" are "otherwise authorized by law" is obscure. "Mitigating circumstances" are not defined or enumerated at all.

The jury may – but need not – impose a death sentence in all capital cases other than those of homicide when it finds beyond a reasonable doubt a "statutory aggravating circumstance." For to condemn a defendant, it must also make a "recommendation of death."[8] Ga. Code Ann. § 27-2534.1(c). *See* Ga. Code Ann. § 26-3102.

Provision is made for the filing of a standardized form of "report" by the trial judge in capital cases where the death penalty is imposed and for direct automatic appeal to the Georgia Supreme Court.

[8]At the time of petitioner's trial, Ga. Code Ann. § 27-2303 provided:

"In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

General guidelines for review are provided,[9] and the Georgia Supreme Court is empowered to affirm the death sentence or to set it aside and remand the case for resentencing. *Ibid.*

Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

The discrepancy between the regularity and even-handedness constitutionally required in capital sentencing and the unpredictable arbitrariness which results from the modified Georgia procedures can only be appreciated after analysis of the various selective mechanisms which operate before, during, and after sentencing of defendants charged with crimes potentially punishable by death. For the imposition of a death sentence in Georgia remains an extraordinarily rare and fortuitous event not only because judges and juries so often seize the opportunity for mercy offered in sentencing discretion, but also because a death

[9]The Court is directed to consider "the punishment as well as any errors enumerated by way of appeal" in a case where a death sentence has been imposed and to determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ga. Code Ann. § 27-2537(c). If the court affirms a death sentence, it "shall include in its decision a reference to those similar cases which it took into consideration." Ga. Code Ann. § 27-2537(e).

sentence signifies that a defendant has missed each of the many opportunities for a lesser disposition.

A. Pre-Sentence Selective Mechanisms

Arbitrary selection operates well before sentencing to spare a substantial portion of Georgia capital defendants, although others similarly situated are ultimately sentenced to death. The principal importance of these pre-sentence selective mechanisms is that they provide an arbitrary sparing for all but a relative handful of defendants originally charged with capital crimes. But this screening out process is also significant because it effectively nullifies a key device upon which the new statute purportedly relies for the control of arbitrary discretion – comparative review in the Georgia Supreme Court – by limiting the base of the comparison to a fraction of the eligible population. See pp. 28-32, *infra*.

1. Prosecutorial Discretion

The impact of the district attorney's discretion on the administration of criminal justice in Georgia is enormous and is unaffected by the new capital punishment statute: "Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."[10] In Georgia, the

[10]Note, *Prosecutorial Discretion*, 21 DE PAUL L. REV. 485, 486 (1971-1972).

decision to prosecute and the choice of charges for which indictment will be sought are left to the district attorney's absolute, unguided discretion. The district attorney's mandate is simply "to prosecute all indictable offenses." Ga. Code Ann. § 24-2908(4). The decision to prosecute petitioner for two capital crimes (murder and armed robbery), in a system where one feature that renders each crime potentially capital is its commission "while the offender was engaged in the commission of another capital felony," Ga. Code Ann. § 27-2534.1(b)(2), is a striking example of the extent to which arbitrary prosecutorial decisionmaking may, quite literally, mean the difference between life and death.

The district attorney also has great discretion to enter a judgment of *nolle prosequi*. He must obtain the consent of the court,[11] but the standards for granting or denying such consent are nowhere specified. Ga. Code Ann. § 27-1801.

Furthermore, the district attorney's discretion to plea bargain – a process by which an estimated ninety per cent of all criminal cases are resolved[12] – is utterly unfettered by the new capital punishment statute, or by any other significant restriction.[13] The fact that capital cases are likely to take up a great deal of time in preparation and trial makes them particularly likely to be settled by plea bargaining.[14] The peculiar harshness

[11]Once the case has been submitted to the jury, the district attorney must also obtain the consent of the defendant to enter a *nolle prosequi*. Ga. Code Ann. § 27-1801.

[12]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

[13]See *Thomason v. Caldwell*, 229 Ga. 637, 194 S.E.2d 112 (1972).

[14]Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1966).

of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error and increases the pressure to settle a capital case by a negotiated guilty plea:

> "Since time immemorial [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a . . . [capital] trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an appellate court."[15]

See *Caldwell v. Paige*, 230 Ga. 456, 197 S.E.2d 692 (1973) (plea bargain made after death sentence reversed).

2. Jury Discretion

Although the new Georgia capital punishment statute expressly confers sentencing discretion upon the trial jury following conviction, see pp. 23-27, *infra*, that is not the first or only means available to the jury to spare the defendant's life in cases where, if otherwise disposed, it might choose to sentence him to die. At the first stage of Georgia's bifurcated trial, the jury may convict him of a lesser offense, or it may recognize some amorphous and subjectively defined defense and acquit him altogether.

A Georgia trial judge must charge lesser included offenses when they are established under any view of the evidence, *Sims v. State*, 203 Ga. 668, 47 S.E.2d 862 (1948) and may give such a charge "where, from

[15]Bedau, *Death Sentences in New Jersey*, 19 RUTGERS L. REV. 1, 30 (1963).

the evidence or from the defendant's statement at the trial, there is *anything deducible* which would *tend* to show that he was guilty of [the lesser offense] . . . or which would be sufficient to raise a *doubt* as to which of these grades [of the offense] . . . was committed." *Echols v. State*, 46 Ga. 668, 168 S.E. 790 (1933) (emphasis in original), citing *Reeves v. State*, 22 Ga. App. 628, 97 S.E. 115 (1918). Moreover, a charge regarding a lesser offense is essentially immune from appellate scrutiny even though it is entirely inconsistent with the evidence presented at trial, *Williams v. State*, 204 Ga. 837, 51 S.E.2d 825, 830 (1949).

The jury may convict of criminal attempt even though the crime was consummated, Ga. Code Ann. § 26-1004, and despite the prosecutor's failure to charge the crime of attempt, Ga. Code Ann. § 26-1005. It may convict of an assault with intent to commit a crime even though the crime was consummated, Ga. Code Ann. § 26-1303.

The jury is thus given considerable unreviewable discretion – contingent, of course, upon the exercise of discretion by the trial court in the choice of crimes on which the jury will be instructed[16] – to convict a capital defendant of a lesser offense, not only in cases where the distinctions between crimes or degrees of offense are blurred, but also in cases where conviction of the lesser offense would be wholly inconsistent with the facts proved.

A jury may also be instructed to acquit on the basis of necessarily speculative and imprecise determinations regarding the state of the defendant's mind at the time of the crime. Acquittal is authorized when, at the time

[16]See note 22, *infra*.

of the alleged crime, the defendant "lacked the mental capacity to distinguish between right and wrong", Ga. Code Ann. § 26-702, suffered "a delusional compulsion . . . which overmastered his will," Code Ann. § 26-703, or was acting on the basis of "a misapprehension of fact, which if true, would have justified the act," Ga. Code Ann. § 26-705. Acquittal may also be based upon prescribed justifications, the determination of which involves not only findings as to the defendant's state of mind at the time of the crime, but also judgments as to the reasonableness of the defendant's conduct. Such judgments will inevitably vary with the mores of the deciders. Justification is a defense defined in vague, subjective terms in a variety of enumerated situations (Ga. Code Ann. §§ 26-901(a)-(e), 902-904, 906) and is also allowed "*/i/n all instances which stand upon the same footing of reason and justice as those enumerated . . . .*" Ga. Code Ann. § 26-902(f) (emphasis added). The fluid nature of these concepts, which are "notoriously refractory to the best-instructed human understanding,"[17] as Justice Cardozo recognized long ago when analyzing the distinction between first and second degree murder, affords the jury an indirect "dispensing power" of mercy vouchsafed them "in a mystifying cloud of words."[18]

B. Sentencing Discretion

Once a Georgia defendant has been convicted of a capital crime, the sentencer has absolute discretion to

[17]Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 299, (1971).

[18]CARDOZO, LAW AND LITERATURE (1931) 99.

impose a sentence of life imprisonment, since the procedure of finding "aggravating" and "mitigating" circumstances at the second stage of a bifurcated proceeding does not – and was not intended to – confine the unfettered power of the sentencer to spare the life of a sympathetic capital defendant.[19] See *Furman v. Georgia*, 408 U.S. 238, 401 (1972) (Mr. Chief Justice Burger, dissenting). The finding of a statutory "aggravating circumstance" and no "mitigating circumstances" does not compel a sentencing jury to impose a death sentence, because the statute also requires the jury to make a "recommendation of death," Ga. Code Ann. §§ 26-3102, 27-2534.1(c).[20]

[19]See C. Brewster, *The Georgia Death Penalty Statute – Is It Constitutional, Even After Revision?* 3 GA. J. CORR. 14, 18 (Winter, 1974).

[20]The intent of the statute to confer this discretion on the sentencing jury is made explicit by examination of Ga. Laws 1973, p. 171, Act No. 74, which prohibits a trial judge from imposing a death sentence in a murder or armed robbery case after defendnat has pleaded guilty unless the trial judge finds one of the "statutory aggravating circumstances," but which also provides that the "judge . . . may, *in his discretion*, . . . sentence such person to life imprisonment, or to any lesser punishment authorized by law for the offense named in the indictment." *Ibid.* (emphasis added). Thus, although the trial judge may not sentence to death a defendant who pleads guilty without finding a "statutory aggravating circumstance," he still has complete unfettered discretion *not* to impose the death penalty. Plainly, the legislature intended the sentencing jury to exercise a similar discretion, for the procedure would otherwise be in violation of *United States v. Jackson*, 390 U.S. 570 (1968). See Comment, *Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response*, 24 MERCER L. REV. 891, 931 (1973).

The particular "aggravating circumstances" specified in the statute are extremely vague, all-encompassing, and open to different interpretations in like cases, depending upon the subjective judgment of the sentencer. Terms like "substantial history of serious assaultive criminal convictions," Ga. Code Ann. § 27-2534.1(b)(1), creation of a "great risk of death to more than one person," Ga. Code Ann. § 27-2534.1(b)(3), and use of a "weapon or device which would normally be hazardous to the lives of more than one person" *id.*, are extremely imprecise and leave great freedom to the trial judge or jury to define their content. In addition to the great vagueness of these phrases, their coverage is extraordinarily broad. To allow the sentencer to impose a death penalty if the crime of murder or armed robbery is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. § 27-2534.1(b)(7), is potentially to authorize capital punishment for *any* murder or armed robbery.[21] Furthermore, the list of statutory "aggravating circumstances" is not exclusive or exhaustive, so that even if the foregoing "aggravating

[21]The finding of an "aggravated battery" is a "statutory aggravating circumstance" which justifies a jury's death verdict for the crime of murder. Ga. Code Ann. § 26-1305 defines "Aggravated Battery" as follows:

> "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

It appears, therefore, that a jury would be justified in returning a death verdict in *any* murder case, on the basis of the existence of this "statutory aggravating circumstance."

circumstances" did somehow curb the sentencer's discretion, the sentencer is still free to consider any "aggravating circumstances otherwise authorized by law." Ga. Code Ann. § 27-2534.1(b). Exactly what this phrase means is obscure but it is clear that there is very little limitation on the nature or scope of evidence in aggravation which may be heard or considered.[22] While the statute sets forth certain factors in aggravation for the jury to consider, it nowhere directs that the jury may not consider other factors in aggravation. The statute does "no more than suggest some subjects for the jury to consider during its deliberations." *McGautha v. California*, 402 U.S. 183, 207 (1971).

The statute does not define "mitigating circumstances," and the sentencer is therefore free in any case to consider *anything* a mitigating factor which should

[22]The ambiguous provisions of the statute which empower the trial judge to instruct upon aggravating and mitigating circumstances magnify the effect of the vagueness of the statutory circumstances themselves in jury trials. The trial judge "shall include" in his instructions "*any* mitigating circumstances or aggravating circumstances otherwise *authorized* by law and any of the following statutory aggravating circumstances *which may be supported by the evidence.*" Ga. Code Ann. § 27-2534.1(b) (emphasis added). Again, the trial judge is to give such "statutory instructions" as he determines "to be *warranted* by the evidence" in writing to the jury. Ga. Laws, 1973, p. 165, Act No. 74 (emphasis added). It is not certain whether "supported by the evidence" is equivalent to be "warranted by the evidence" and, if it is, it is unclear what the standard is. The trial judge thus has an enormous discretion to present to the jury reasons to impose or not impose the death sentence in the case before it.

justify mercy.[23] There is thus *no case at all* in which the sentencer might not conclude that some factual element was present which entitled the defendant to a lesser sentence than death.

The deficiencies of the statute, and particularly the imprecision, lack of objective guidelines and arbitrariness in the sentencing state engendered by the specified "statutory aggravating circumstances" are glaringly illustrated in petitioner's case. After petitioner was convicted on two counts of murder and two counts of armed robbery, a sentencing hearing was held and the trial court charged the jury on the possible "aggravating circumstances" it might consider, (See pp. 7-9, *infra.*) The jury recommended death on all four counts, conveniently using the armed robbery counts in aggravation of the murder counts and the murder counts in aggravation of the armed robbery counts pursuant to the circumstance that the capital offenses were committed "while the offender was engaged in the commission of another capital felony" specified in Ga.

[23]There is no limitation, see Ga. Laws, 1973, p. 162, Act No. 74, upon the arguments which can be made by the defendant and prosecutor on the issue of punishment:

> "If the purpose of this Act is to strictly limit discretion in capital cases, one wonders what must be the purpose of such a wide-open allowance of evidence and arguments in mitigation and aggravation. . . . If the state desires to comport with [*Furman*] . . . which indicated that . . . discretion might be greatly restricted by limiting considerations to *specific, objective,* statutorily-prescribed guidelines, why, then, should the *hearing* of arguments and evidence in mitigation and aggravation remain unrestricted?"

Comment, *Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response,* 24 MERCER L. REV. 891, 932 (1973) (emphasis in original).

Code Ann. § 27-2534.1(b)(2). In further aggravation of the armed robbery counts, the jury was instructed by the trial court that it could find that the robberies were "outrageously or wantonly vile, horrible and inhuman in that they involved the depravity of the mind of the defendant" in accordance with Ga. Code Ann. § 27-2534.1(b)(7).[24] How the armed robberies could possibly have involved the "depravity of the mind" of the petitioner is nowhere stated, nor does the statute require that it be stated. Instead all that is required of the jury in its finding of "aggravating circumstances" is the affixation of certain conclusory labels to the defendant's conduct and the incantation of certain magical phrases in the words of the statute.

In short, under the sentencing provisions of the new Georgia capital punishment statute, any case becomes a possible one for the death penalty or for life imprisonment, and total discretion is left to jurors and trial judges to determine whether any particular defendant shall be put to death. This statute is one in which "the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges and juries the decision as to those cases, if any, in which the penalty will be

[24]The Supreme Court of Georgia set aside and remanded for resentencing petitioner's two death sentences for the offenses of armed robbery, holding that the sentences of death were excessive or disproportionate to the penalties imposed in similar cases, and further holding that the murders could not properly be used in aggravation of the armed robberies where the armed robberies were used in aggravation of the murders. *Gregg v. State,* 233 Ga. 117, 127 (1974) (A. 12).

utilized." *Furman v. Georgia*, 408 U.S. 238, 310-311 (1972) (Mr. Justice White, concurring).[25]

C. Post-Sentence Selective Mechanisms

1. Appellate Review

Although this Court, concurrently with *Furman v. Georgia*, and on its authority, reversed death sentences which had been reviewed by state appellate courts and affirmed on the express ground that the facts and circumstances warranted the extreme penalty,[26] the Georgia legislature has apparently chosen to rely upon a similar review procedure as a response to *Furman*.

[25] At the time of *Furman v. Georgia*, several states had limitations on the jury's discretion to make the life-death choice and standards for the appropriate exercise of that discretion. Death sentences from these states were nevertheless uniformly held unconstitutional. *Davis v. Connecticut*, 408 U.S. 935 (1972) (see Conn. Gen. Stat. Ann., § 53-10); *Moore v. Illinois*, 408 U.S. 786 (1972) (see *People v. Black*, 367 Ill. 209, 10 N.E. 2d 801, 804 (1937); *People v. Sullivan*, 345 Ill. 87, 177 N.E. 733 (1933); Ill. Rev. Stat., c. 38, § 1-7-(c)(1)); *Alvarez v. Nebraska*, 408 U.S. 937 (1972) (see *Sundahl v. State*, 154 Neb. 550, 48 N.W. 2d 689, 704 (1951); *Billingsley v. New Jersey*, 408 U.S. 934 (1972) (see N.J. Stat. Ann., § 2A:113-4 (1969); *State v. Reynolds*, 41 N.J. 163, 195 A.2d 449 (1963)); *Duling v. Ohio*, 408 U.S. 936 (1972) (see *State v. Tudor*, 154 Ohio St. 249, 95 N.E. 2d 385, 390 (1950); *State v. Eaton*, 19 Ohio St. 145, 249 N.E. 2d 897 (1969)); *Herron v. Tennessee*, 408 U.S. 939 (1972) (see Tenn. Code Ann., § 39-2406 (1955); *Woodruff v. State*, 164 Tenn. 530, 51 S.W. 2d 843, 847 (1932)).

[26] *See e.g. Alford v. Eyman*, 408 U.S. 939 (1972) (see *State v. Alford*, 98 Ariz. 124, 402 P.2d 551, 557 (1965); Ariz. Rev. Stat., § 13-1717); *Hurst v. Illinois*, 408 U.S. 935 (1972) (see

(continued)

> "[T]he new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

Coley v. State, 231 Ga. 829, 834 (1974). This review process whereby the Supreme Court of Georgia is asked to determine "[w]hether the sentence of death was

(footnote continued from preceding page)

People v. Hurst, 42 Ill. 2d 217, 247 N.E. 2d 614 (1969)); *Alvarez v. Nebraska*, 408 U.S. 937 (1972) (See *State v. Alvarez*, 182 Neb. 358, 154 N.W.2d 746, 748 (1967); Neb. Rev. Stat., § 29-2308); *Fesmire v. Oklahoma*, 408 U.S. 935 (1972) (see *Fesmire v. State*, 456 P. 2d 573, 586-587 (Okla. Ct. Cr. App. 1969)); *Phelan v. Brierly*, 408 U.S. 939 (1972) (see *Commonwealth v. Phelan*, 427 Pa. 265, 234 A.2d 540 (1967); *cf. Commonwealth v. Hough*, 358 Pa. 247, 56 A.2d 84, 85-86 (1948) *with Commonwealth v. Edwards*, 380 Pa. 52, 110 A.2d 216, 217 (1955)).

The Court reversed death sentences from these states even though these same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances.

See e.g. State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970); *People v. Crews*, 42 Ill. 2d 60, 244 N.E.2d 593 (1969); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964); *Lewis v. State*, 451 P.2d 399 (Okla. Ct. Crim. App. 1969); *Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959).

imposed under the influence of passion, prejudice, or any other arbitrary factor," "[w]hether . . . the evidence supports the . . . finding of a statutory aggravating circumstance," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar . . . cases, considering . . . both the crime and the defendant, "Ga. Code Ann. § 27-2537(c), in fact exacerbates the arbitrariness of capital sentencing.

First, the vagueness and breadth of the statutory "aggravating circumstances" means that the death penalty can be imposed in virtually any capital case, while the fact that "mitigating circumstances" are undefined means that the jury can find a reason to afford mercy to any capital defendant. Given this enormous statutorily-authorized sentencing discretion, it is difficult to see how the Georgia Supreme Court can determine whether "any . . . arbitrary factor" influenced the sentencing deliberations.

Second, the Georgia Supreme Court's reliance on cases that are appealed[27] as a standard for determining whether a "sentence of death is excessive or disproportionate to the penalty imposed in similar cases,

[27]The new Georgia statute requires a trial judge's report only in cases where a death sentence is actually imposed. Ga. Code Ann. § 27-2537(a). The statute also directs the Georgia Supreme Court to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann. § 27-2537(f). Preparation of a formal appellate "record" occurs, of course, only in those cases which are appealed, and it is purely fortuitous whether defendants sentenced to life in cases factually like those of any particular condemned defendant will choose to appeal.

considering both the crime and the defendant," Ga. Code Ann. § 27-2537(c)(3), will provide no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances. A comparative sample consisting only of cases appealed to the Georgia Supreme Court is drastically skewed in two ways. Otherwise eligible cases are ignored which involve similar factual circumstances but which were disposed of by various selective mechanisms described above. No account is taken of those capital crime convictions where a life sentence is imposed and no appeal is taken. The myopia inherent in this scheme will prevent ascertainment of the penalties normally imposed in particular circumstances.[28]

Third, the appellate review provisions of the new statute explicitly authorize comparison of death sentences with sentences in pre-*Furman v. Georgia* cases tried under procedures which this Court has already condemned because they lent themselves to arbitrary and discriminatory application. The Georgia Supreme Court is directed to consider "capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate." Ga. Code Ann. § 27-2537(f), and all but one of the cases listed in the "similar cases considered by the court" Appendix attached to the opinion of the Supreme Court of Georgia in petitioner's case were decided under statutes whose death penalty procedures

[28]See C. Brewster, *The Georgia Death Penalty Statute - Is It Constitutional, Even After Revision?* 3 GA. J. CORR. 14, 19 (Winter, 1974) for hypothetical examples of the inequities produced by this form of appellate review.

were invalidated by *Furman v. Georgia.*[29] The result, of course, is a perpetuation of the Eighth Amendment arbitrariness condemned by this Court on June 29, 1972. For post-*Furman v. Georgia*, death sentences are affirmed or reversed on the basis of their conformity with a "standard" consisting of cases in which the death penalty was "wantonly and . . . freakishly imposed," *Furman v. Georgia, supra*, at 310 (Mr. Justice Stewart concurring), at a time when "there [was] . . . no meaningful basis for distinguishing the few cases in which it [was] . . . imposed from the many cases in which it [was] . . . not," *id.* at 313 (Mr. Justice White concurring) and when "the discretion of judges and juries in imposing the death penalty enable[d] the penalty to be selectively applied, feeding prejudices against the accused if he [were] . . . poor and despised,

[29] See *Gregg v. State*, 233 Ga. 117, at 128 (A. 13). The Appendix in *Gregg* listed the following similar cases:

Henderson v. State, 227 Ga. 68 (179SE2d 76); *Hart v. State*, 227 Ga. 171 (179 SE2d 346); *Pass v. State*, 227 Ga. 730 (182 SE2d 779); *Watson v. State*, 229 Ga. 787 (194 SE2d 407); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431); *Sirmans v. State*, 229 Ga. 743 (194 SE2d 476); *Scott v. State*, 230 Ga. 413 (197 SE2d 338); *Whitlock v. State*, 230 Ga. 700 (198 SE 2d 865); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805); *Bennett v. State*, 231 Ga. 458 (202 SE2d 99); *Howard v. State*, 231 Ga. 186 (200 SE2d 755); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441); *Morgan v. State*, 231 Ga. 280 (201 SE2d 468); *House v. State*, 232 Ga. 140 (205 SE2d 217); *Allen v. State*, 231 Ga. 17 (200 SE2d 106); *Smith v. State* 230 Ga. 876 (199 SE2d 793); *Johnson v. State*, 231 Ga. 138 (200 SE2d 734); *Lingerfelt v. State*, 231 Ga. 354 (201 SE2d 445).

House v. State, 232 Ga. 140, is the only case cited which was not decided under statutes whose death penalty procedures were held invalid in *Furman* – because they lent themselves to arbitrary and discriminatory imposition of the death sentence.

lacking political clout, or if he [were] . . . a member of a suspect or unpopular minority." *Id.* at 255 (Mr. Justice Douglas, concurring).

Finally, the Georgia Supreme Court's failure to provide reasoned opinions in support of its sentence review decisions makes it impossible to determine whether this procedure is fulfilling its ostensible purpose. In petitioner's case, the Court provided a list of cases it had "considered", but it did not articulate any principles which would rationalize the cases, indicate what elements of the case under review mandated (or did not mandate) a death sentence. describe the factual circumstances in cases where the appellate report does not disclose them, or explain why certain other cases were not considered.

D. Executive Clemency

The capital defendant who fails to escape the death penalty during the charging, plea bargaining, guilt determination, and sentencing processes is subjected to a final lottery in which the Executive Department (the three members of the Board of Pardons and Paroles acting with the consent of the Governor) has absolute discretion to spare his life or permit his execution. Georgia Constitution, Art. V, § 2-3011, par. XI, Ga. Code Ann. § 77-511. There are no standards whatsoever for the exercise of the commutation power, and the state courts have "no jurisdiction" to review the grant or denial of a commutation in a death case. *Parks v. State*, 206 Ga. 675, 58 S.E.2d 142, 145 (1950). In the eighteen years between 1946 and 1963, 41 of 187 condemned prisoners (22%) were spared by executive

clemency.[30] In view of the precipitous decrease in the number of executions over the past few decades, it appears reasonable to assume that under the new Georgia death penalty statutes, a significant number of those defendants condemned to die will be spared through the exercise of the freakish mercy of executive clemency.

The preceding view of the post-*Furman v. Georgia*, modifications in Georgia's capital procedures reveals that discretionary opportunity for imposition or avoidance of the penalty are, in fact, as numerous and as unregulated as in the pre-June 29, 1972 period. The arbitrariness present in all stages of the procedural system thus insures "that there is no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not."[31] After *Furman*, Georgia "was confronted with the serious task of devising a new . . . system consonant with her own political ideas but also consistent with the Federal Constitution."[32] It is submitted that Georgia's modified capital punishment procedures are no more consistent with the Eighth and Fourteenth Amendments to the United States Constitution than were the capital punishment procedures invalidated in *Furman*, and the Georga legislative's attempt to evade the meaning of *Furman* should be recognized as nothing more than the exaltation of form over substance and should be brought to an immediate halt by this Court.

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[30]Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 192 (1964).

[31]*Furman v. Georgia, supra*, 408 U.S. at 313 (Mr. Justice White, concurring).

[32]*Lane v. Wilson*, 307 U.S. 268, 275 (1938).

II.

THE EXCESSIVE CRUELTY OF DEATH

Eighth Amendment standards are not static, and the prohibition against cruel and unusual punishment is not "confine[d] to such penalties and punishments as were inflicted by the Stuarts." *Weems v. United States*, 217 U.S. 349, 372 (1910). Instead, the clause prohibiting cruel and unusual punishment is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," *Id.* at 378, and informed by "the light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962).

Part I of this brief demonstrated that the imposition of the death penalty remains arbitrary, random and occasional under Georgia's modified capital punishment procedure because that procedure involves a series of uncontrolled discretionary judgments that operate to spare the lives of some defendants while other in similar circumstances are sentenced to die. Part II of this brief will now attempt to demonstrate that the punishment of death is on its face violative of the Eighth Amendment because it is excessive and affronts the principle of human worth embodies in the prohibition of cruel and unusual punishments as defined in the light of contemporary human knowledge.

To avoid burdening this Court with repetitive matter, petitioner adopts and incorporates the argument set forth in Part III of the Brief for Petitioner, *Jurek v. Texas*, (No. 75-5394) (certiorari granted January 22, 1976) at pp. (attached hereto as Appendix A).

CONCLUSION

Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Georgia should therefore be reversed.

Respectfully submitted,

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APPENDIX A

Pp. , Brief for Petitioner, Part III, *Jurek v. Texas* (No. 75-5394) (Certiorari granted January 22, 1976).

III. THE EXCESSIVE CRUELTY OF DEATH

Additional grounds compel the conclusion that the penalty of death is an unconstitutionally cruel and unusual punishment in this last quarter of the Twentieth Century. We have set forth those grounds in Part III of Petitioner's *Fowler* Brief, at pp. 102-140,[1] and we adopt them here.[2] Our submission, summarily, is (1) that the unique characteristics of the death penalty demand a particularly exacting standard of judicial review under the Eighth and Fourteenth Amendments (Petitioner's *Fowler* Brief, at pp.

[1] Part III of Petitioner's *Fowler* Brief is further documented by Appendices D and E to the same brief. *See also* Reply Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at pp. 2-7, 15-19, and Appendices B, C, and E thereto. Because the latter brief was not printed and was distributed to the Court on pages of an awkward size, we reproduce it (together with its appendices) as Appendix 2 to the present brief. It is hereafter cited as Petitioner's *Fowler* Reply Brief, and page references are made to the version contained in Appendix 2.

[2] As elsewhere in this present brief, we incorporate Petitioner's *Fowler* Brief by reference in order to spare the court the burden of substantially repetitious reading. As counsel for petitioner Jerry Lane Jurek, however, we are necessarily concerned lest even the most efficient of shorthand devices deprive him of the Court's full consideration of arguments on which his life may depend. We must therefore implore the Court to consider the original text of Petitioner's *Fowler* Brief once again here. Our present one-sentence summary of forty pages of that brief is not intended as a substitute for the original.

103-121);[3] (2) that, when tested under this standard, the obvious cruelty[4] of the extreme penalty[5] cannot be found to be "justified by the social ends it was [legislatively] deemed to serve"[6] (Petitioner's *Fowler* Brief, at pp. 121-130);[7] and (3) that, while a judgment condemning capital punishment as excessively cruel[8]

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[3] *See also Commonwealth v. O'Neal,* ____ Mass. ____, 339 N.E.2d 676, 678-681 (1975) (opinion of Chief Justice Tauro); 339 N.E.2d at 694 (opinion of Mr. Justice Wilkins). In *O'Neal,* a majority of the Supreme Judicial Court of Massachusetts held that the death penalty for rape-murder was a "cruel or unusual punishment" forbidden by Article 26 of the Massachusetts Declaration of Rights.

[4] *Furman v. Georgia, supra,* 408 U.S. at 314 (concurring opinion of Mr. Justice White). *See* Petitioner's *Fowler* Brief, at pp. 109-114.

[5] Like other euphemisms designed to draw a veil of "decent reticence" across the reality of killing human beings (*see* KOESTLER & ROLPH, HANGED BY THE NECK 11-12 (1961)), this phrase from the vernacular inevitably betrays the point that "[c]apital punishment, involving as it does the taking of life, is qualitatively different from other punishments." *Commonwealth v. O'Neal,* ____ Mass. ____, 339 N.E.2d 676, 680 (1975) (opinion of Chief Justice Tauro). *See* note 30 *infra.*

[6] *Furman v. Georgia, supra,* 408 U.S. at 314 (concurring opinion of Mr. Justice White).

[7] The inadequacy of incapacitative, deterrent and retributive justifications to support the death penalty is further discussed in Petitioner's *Fowler* Reply Brief, at pp. 17-19 and Appendices C and E; and the discussion is updated by references to recently published materials in Appendix 3 to the present brief, *infra. See also Commonwealth v. O'Neal,* ____ Mass. ____, 339 N.E.2d 676, 681-688 (1975) (opinion of Chief Justice Tauro).

[8] An historical study published since the filing of Petitioner's *Fowler* Brief documents the concern of the Eighth Amendment's Framers against excessive punishments Schwartz & Wishingrad,

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can thus be reached independently by this Court[9] in the exercise of its constitutional function to consider "all that the legislature did or could take into

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The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States *Excessive Punishment Doctrine,* 24 BUFFALO L. REV. 783 (1975). *See also* BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 3 (1975). Schwartz and Wishingrad further underscore the point made in Petitioner's *Fowler* Brief, at pp. 26-45, and central to the holding of *Furman v. Georgia, supra,* that it is a mistake to view the Eighth Amendment as a single-purpose instrument directed against the isolated evil of barbarous punishments. Rather, like the other basic guarantees of the Bill of Rights, *see, e.g.,* LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968), the prohibition against cruel and unusual punishments reflects a constellation of related concerns – against savagery, excessiveness, and arbitrariness in the imposition of criminal penalties – and must be construed in the light of "the broader conceptions and principles that underlie" it. Schwartz & Winshingrad, *supra,* 24 BUFFALO L. REV. at 793 n.42; *see id.* at 784, 786-793, 815-816, 827; Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1733, 1784-1798 (1970). As Mr. Justice Blackmun wrote while a Circuit Judge:

> "the emphasis is on man's basic dignity, on civilized precepts, and on flexibility and improvement in standards of decency as society progresses and matures . . . [B]road and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable."

Jackson v. Bishop, 404 F.2d 571, 579 (C.A.8 1968).

[9] Such a judgment was reached only recently by the Supreme Judicial Court of Massachusetts in the *O'Neal* case described in note 3 *supra.* Two of the four concurring Justices in *O'Neal* rested the invalidation of Massachusetts' death penalty for rape-murder upon state due-process grounds as well as state cruel-or-unusual-punishment grounds.

account,"[10] such a judgment is unmistakably confirmed by the history of the *use* of the death penalty in this country in this century, demonstrating a dramatically progressive reluctance "to impose or authorize the carrying out of a death sentence"[11] and amounting to a national repudiation of capital punishment that "could hardly be more complete without becoming absolute"[12] (Petitioner's *Fowler* Brief, at pp. 130-140).[13]

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[10] *Weems v. United States*, 217 U.S. 349, 378-379 (1910). *See also United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

[11] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

[12] *Furman v. Georgia*, *supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan). *See* note 44 *infra*.

[13] This submission does not ignore the facts that 151 persons were committed to prison under death sentences in 1974, UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974*, Table 7, p. 26 (November 1975), and that, by our latest count, there are now persons on death row in the United States under death sentences imposed since *Furman*. As raw numbers, these figures are not inconsiderable, but they represent only a fraction of the total number of cases in which death sentences might have been imposed. The size of the fraction is incalculable for the obvious reasons that (1) no reliable statistics are compiled regarding the numbers of potentially capital cases which receive noncapital dispositions as a result of discretionary decisions beginning with the initial police "papering" of the case and proceeding through conviction; and (2) there are extreme difficulties in estimating even the proportion of persons convicted of capital offenses who are sentenced to death, *see* Appendix F to Brief for Petitioner in *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027], at pp. 1f-3f. Nevertheless, it is obvious that a very large proportion of potentially "capital" cases are processed through to non-capital sentences under the various evasive mechanisms that characterize

This submission, unlike the submission in Parts II of Petitioner's *Fowler* Brief and of the present Brief, does not depend fundamentally upon the perpetuation of

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the administration of post-*Furman* death-penalty laws as described in Parts II of this brief and of Petitioner's *Fowler* Brief. *See, e.g.*, Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976). Furthermore, of course, substantial numbers of death-*sentenced* defendants are relieved of those sentences as a result of post-conviction judicial proceedings: "[t]he system has become one in which a substantial portion of those condemned are kept for years under the agonizing threat of death with intermittent reversals and retrials until such time as prosecutors or juries are willing to settle for sentences of life imprisonment." Barrett, *Anderson and the Judicial Function*, 45 SO. CALIF. L. REV. 739, 744 (1972). *See also* BEDAU, THE DEATH PENALTY IN AMERICA 36-38, 94-98 (rev. ed. 1967). And additional substantial numbers are relieved of execution by executive clemency. *See, e.g.*, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964); Petitioner's *Fowler* Brief, at pp. 95-100. Professor White has recently noted that, because "both 'mandatory' and 'guided discretionary' [death penalty statutes enacted after *Furman*] . . . function in a system honey-combed with discretion," the "new systems of capital punishment [will probably] . . . not alter the fact that the death penalty is infrequently applied." White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 45 AM. J. ORTHOPSYCHIATRY 581, 587, 589 (1975) [hereafter cited as White]. But recognizing that "the rate at which executive clemency was granted under a jury-discretionary system will be likely to underestimate the number of commutations to be expected under a 'mandatory' system," *id.* at 589 (footnote omitted), Professor White points out that the *total extent* to which post-*Furman* "mandatory" death sentences are averted in practice cannot now be known (or learned, except by a grisly experiment), since "[u]ntil a capital defendant is actually executed, it cannot be determined that the

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systems of arbitrary selectivity in the administration of capital punishment after *Furman*. It is, however, strongly reinforced in the context of such systems,

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power of executive clemency will not be exercised to spare the defendant's life," *id.* at 588 n.**.

Finally, there seems little doubt that the number of death sentences that continue to be imposed today – eight years and eight months after the last execution conducted in this country – is a function in part of the fact that many jurors do not regard a death sentence as "real" or believe that it will ever be carried out. *See* Leavy, *Mamie Lee Ward on Death Row*, 5 M.S. 70, 106 (Nov. 1975) ("None of the jurors I spoke to believed Mamie's death sentence would ever be carried out. North Carolina's last execution, in 1961, was only a distant memory to them."); Brief for Petitioner in *Aikens v. California, supra*, at pp. 40-41 n.78 ("Jurors are finding it easier to impose the death sentence in murder cases now because they believe it will never be carried out, William J. Stevens, Jr., assistant district attorney in charge of homicides, said yesterday .... Stevens emphasized that Governor Shapp has said no prisoner will be executed while he is in office. Prior to Shapp's inauguration last January, the state had observed an eight-year amnesty on imposition of the death penalty.... 'For me personally, it would resolve any residual doubts when I know it's a token gesture anyway.'"). *Compare* HUIE, THE EXECUTION OF PRIVATE SLOVIK 169 (5th Dell ed. 1974):

> "I think every member of the court thought that Slovik deserved to be shot; and we were convinced that, for the good of the division, he *ought* to be shot. But in honesty – and so that people who didn't have to go to war can understand this thing – this must be said: I don't think a single member of that court actually believed that Slovik would ever be shot. I know I didn't believe it.... I had no reason to believe it.... I knew what the practice had been. I thought that the sentence would be cut down, probably not by General Cota, but certainly by Theater Command. I don't say this is what I thought *should* happen; I say it is what I felt *would* happen. And I thought that not long after the war ended – two or three years maybe – Slovik would be a free man."

See also id. at 173, 188.

where the few convicted defendants "whose execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard [are] ... sent to their death because none of a large number of actors thought they deserved to be spared."[14] The fact that the administration of Texas' capital-punishment procedures is permeated with "avenues of discretionary mercy" comparable to those found in North Carolina and described in Petitioner's *Fowler* Brief,[15] is significant for several reasons.

First, procedures that permit the spotty and sporadic application of a uniquely harsh penalty thereby vitiate the restraints of decency and conscience which can otherwise be counted on to limit legislative choice and public toleration of punishments for crime. They defeat the assurance that the ordinary safeguards of the democratic process will confine criminal penalties within the bounds of contemporary civility, since even the most awful punishments – atrocities that could never command acceptance if they were uniformly and usually applied to any legally defined category of offenses or offenders – can be stomached when inflicted only on some isolated outcasts. This dilution of political responsibility is, we think, the most important single consequence of selective and arbitrary administration of the death penalty from the point of view of constitutional adjudication. But we note it only

[14]Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031, at pp. 75-76.

[15]*Compare* pages - *supra with* Petitioner's *Fowler* Brief, at pp. 45-100.

summarily here because we have discussed it in detail in earlier briefs.[16]

Second, the existence of a pervading network of mechanisms for averting the actual infliction of capital punishment upon death-eligible offenders makes it difficult to take seriously any assertion that the "legislative will is . . . frustrated if the penalty is never imposed . . . ."[17] Legislators are not unaware of the procedural systems within which their enactments operate; and anyone who has the faintest appreciation of the administration of systems of capital justice knows that statutes prescribing categories of "capital" offenses or offenders will be infrequently enforced by the execution of persons within those categories. To be sure, the legislative will *to have a death penalty on the books* is manifested.[18] But that kind of legislative will

[16]The central significance of the point in Eighth Amendment theory is developed in the Brief for Petitioner, *Aikens v. California*, 406 U.S. 814 (1972). [No. 68-5027], at pp. 13-27, appended to Petitioner's *Fowler* Reply Brief as Appendix B, at pp. 1b-15b. Its implications for the appropriate standard of judicial review under *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), are considered in Petitioner's *Fowler* Brief, at pp. 106-107; *see also* White, *supra*, note 13, at 589-590; and its importance in the substantive determination of the constitutionality of the death penalty is discussed in Petitioner's *Fowler* Brief at pp. 120, 133-139.

[17]*Furman v. Georgia*, *supra*, 408 U.S. at 311 (concurring opinion of Mr. Justice White).

[18]Thirty-five States have enacted some form of death penalty since *Furman*. These statutes vary considerably and, for the convenience of the Court, we have summarized them in Appendix A to Petitioner's *Fowler* Brief; Appendix A to Petitioner's *Fowler* Reply Brief; and Appendix 1 to the present brief. The death penalty provisions of the federal Antihijacking Act of 1974, 88 Stat. 409, amending 49 U.S.C. § 1472, are set forth in Appendix A to the Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031.

was also evidenced by the statutes of forty-one States and the federal Government at the time of *Furman* and was understandably held insufficient to justify the actual infliction of death upon a random fraction of offenders while the larger number of their indistinguishable counterparts was spared consistently with the same legislative design.

Surely, also, under both pre-*Furman* and post-*Furman* statutes, legislatures have been willing to countenance the prospect of execution of any unusual individuals who may fortuitiously fall into the meshes of a net through which many others escape. In that sense only (and equally under both forms of statutes) has the legislative judgment been made to exterminate life. Thus, when a particular human being is taken to the execution chamber and the question is asked what justification exists for killing *him*, the answer must inevitably be: no justification that distinguishes him from his survivors or explains why five or two or one, instead of fifty like offenders or no offenders, are being executed in Texas this year.

After *Furman* as before, the Texas Legislature's decision to enact a death penalty statute does not imply a determination that death is the necessary or even fitting punishment for any class of crime or criminal. It says only that death sentences can be tolerated for some fragment of defendants within the class – a fragment which may approach zero and which is selected by procedures that do not connect any particular defendant's death with the asserted reasons for putting him to death. *This* is the "legislative judgment"[19] regarding capital punishment's acceptance by modern society, its value as a deterrent, and society's need for it to reinforce social values and

[19]Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031, at pp. 10-11.

incapacitate dangerous offenders"[20] which this Court is now being urged uncritically to accept.[21]

Third, the fact demonstrated compellingly by Professor Charles Black,[22] that these selective procedures inevitably entail both mistake and caprice,[23] surely must enter into the constitutional evaluation whether capital punishment is "cruel and unusual." There is no way to separate the legislative acceptance of killing people from acceptance of the consequences that some people will be killed wrongly and all will be killed arbitrarily. This again is the legislative judgment to which the Court's deference is sought as representing "the evolving standards of decency that mark the progress of a maturing society."[24]

Here, " 'procedure' and 'substance' look and become one."[25] " 'Though the justice of God [or of the legislature] may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be.' "[26] Certainly we would not dispute that risks of error and arbitrariness inhere in every human administration of justice. But in the

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[20]*Ibid.*

[21]*Ibid.*

[22]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

[23]The concepts are summarized in *id.* at 19-21. quoted in Petitioner's *Fowler* Brief, at pp. 42-43 n.63.

[24]*Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Chief Justice Warren).

[25]BLACK, *op.cit.supra* note 22, at 96. *See* Petitioner's *Fowler* Reply Brief, at pp. 10-14.

[26]BLACK, *op.cit.supra* note 22, at 96.

"balancing process"[27] of Eighth Amendment adjudication,[28] the magnitude of the risk[29] in relation to the irremediability of its consequences[30] cannot proper-

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[27]White, *supra* note 13, at 593.

[28]*See Furman v. Georgia, supra*, 408 U.S. at 307-308 (concurring opinion of Mr. Justice Stewart).

[29]Professor Black's book throughout demonstrates that the risk of capriciousness and error in the administration of capital punishment is great, and his conclusion is confirmed by consideration both of the procedures provided for processing "capital" cases in Texas, *see* pages - *supra*, and other States, *see, e.g.*, Petitioner's *Fowler* Brief, at pp. 41-101, and of the results of the administration of capital justice in the past, *see, e.g. Furman v. Georgia, supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White); Petitioner's *Fowler* Brief, at pp. 43-45, 136-139; note 46 *infra*. *See also* note 51 *infra*.

[30]"It is the factors of ultimacy and irreversibility of the extreme punishment involved in the taking of human life that differentiates death as punishment from all other sanctions. While mutilation, exile, forfeiture, torture, imprisonment and all other forms of punishment have been characterized from time to time as more severe and cruel than necessary to accomplish the needs of society in repelling criminality, it is only the extinguishing of life itself that admits of no compensatory adjustment in the event it is determined that society was wrong or overly harsh in any given case. While the possibility of error does not render the imposition of death as punishment unconstitutional per se any more than does the possibility of error of conviction in non-capital cases, there is a fundamental distinction between death and imprisonment that requireds the most severe punishment, at least, to be imposed in a procedure as free from inequity as humanly possible."

Morgan v. State, Tenn. Ct. Crim. App. No. 492 (Hamilton County), decided January 30, 1976, slip opinion at 4 (opinion of Galbreath, J.). (The *Morgan* decision is described in note 51 *infra*.) *See also* Bobbitt, *Book Review*, 84 YALE L. J. 1769, 1772-1773 (1975):

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ly be ignored.[31]

Fourth, this latter point changes critically all of the specific subquestions relevant to the ultimate question of the constitutional validity of capital punishment.[32] "[T]he question [of deterrence, for example] becomes: 'If the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures of arbitrariness and mistake, does the execution of citizens, some for the wrong reason, some wrongly, and some for no reason at all, deter

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> "We usually tolerate the rough justice such distinctions impose in the criminal justice process – it is in part the source of the justified pride we take in the jury system – because we are aware of the scant utility of judgment by rote. In the situation of a capital penalty, however, this means that some people will be sent to die without anyone being able to say clearly why it is *they* who are dying. The ultimate character of death should, alone, account for the contrast of our horror at this prospect with our tolerance of similar ineffable decision making when the penalties are fines or imprisonment. . . .
>
> " . . . Those corrections or changes in law which represent the development of an ongoing system can be of no saving grace to a process that has put someone beyond its reach."

And see Burrill, *The Immorality of the Death Penalty*, 90 CHRISTIAN CENTURY 99, 101 (1973):

> "The death penalty is . . . the meting out of an infallible penalty by a most assuredly fallible trial system."

[31]The magnitude of the risk in relation to the irremediability of its consequences was described aphoristically by Professors Kalven and Zeisel in their observation that, "[w]hatever the differences on which [the] . . . decision [choosing some capital offenders to die while other live] hinges, they remain demeaningly trivial compared to the stakes." KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966).

[32]BLACK, *op. cit. supra* note 22, at 23-28.

other citizens sufficiently better than long imprisonment?' "[33] "The issue of retribution similarly may be restated in this context. 'Is vengeance so indispensable a good that we should continue the capital penalty knowing that it is sometimes invoked irrationally and sometimes mistakenly, and sometimes arbitrarily forborne (even with the so-called mandatory statutes), with equally little justification?' "[34] Indeed, as Professor Herbert Wechsler has observed, the "issue of retribution" becomes a non-issue because the death penalty is not (and cannot be, under contemporary procedures and amid contemporary values) inflicted in a manner that conforms to any rational retributive objective.[35]

Fifth, The on-again off-again infliction of capital punishment at levels which our society now finds tolerable fails entirely to serve the supposed penological justifications for the punishment,[36] and thus amounts to nothing more than "the pointless and needless extinction of human life with only marginal contributions to any discernible social or public purposes."[37] So inflicted, the death penalty becomes plainly excessive,[38]

[33]The point originates with Professor Black, in the pages cited in note 32 *supra*, but is here quoted in the summary formulation of Bobbitt, *Book Review*, 84 YALE L. J. 1769, 1774 (1975).

[34]Ibid. (same).

[35]*Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 255 (1961), quoted in Petitioner's *Fowler* Brief, at pp. 125-126. *See also* Petitioner's *Fowler* Brief, at p. 126 n.203. *And see* note 51 *infra*.

[36]*See* Petitioner's *Fowler* Brief, at p. 139.

[37]*Furman v. Georgia*, *supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[38]*See Furman v. Georgia*, *supra*, 408 U.S. at 279-280, 300-305 (concurring opinion of Mr. Justince Brennan); *id.* at 309 (concurring opinion of Mr. Justice Stewart); *id.* at 312-313 (concurring opinion of Mr. Justice White); *id.* at 331-332, 342-359 (concurring opinion of Mr. Justice Marshall). *See also* Schwartz & Wishingrad, *supra* note 8, *passim*.

even if its theoretical justifications could be thought, under other conditions, to be more colorable than they are.[39]

Sixth, the punishment of death is the only criminal penalty used in this country today[40] which inevitably entails inflicting an unmeasurable amount of physical pain[41] and a demonstrable amount of psychological

[39]In fact, the incapacitative, deterrent and retributive justifications advanced in support of capital punishment are not colorable under any conditions relevant to the rational choice of penal sanctions in contemporary society. *See* Petitioner's *Fowler* Brief, at pp. 121-130 and Appendix E; Petitioner's *Fowler* Reply Brief, at pp. 17-19 and Appendices C and E; Appendix 3 to the present brief, *infra; Commonwealth v. O'Neal*, ____ Mass. ____, 339 N.E.2d 676, 681-688 (1975) (opinion of Chief Justice Tauro).

[40]Appendix C to the Brief for Petitioner, *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027], collects the numerous harsh physical punishments which were authorized by law and commonly used in the United States at the time of the drafting and adoption of the Eighth Amendment.

[41]The epistemological problem here is obvious, for the physical pain experienced by an executed defendant is not susceptible to direct report. It is simply impossible to tell how rapidly oblivion comes, under any mode of execution. *See* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 246-273; (H.M.S.O. 1953) [Cmd. 8932]; Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1338 (1968); BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 306-309 (3d ed. 1959). Nevertheless, such evidence as is available suggests that there is time for momentary suffering at least. *See* Petitioner's *Fowler* Brief, at pp. 113-114 n.173.

anguish upon the sentenced man.[42] *See generally* *Jackson v. Bishop*, 404 F.2d 571, 577-581 (CA8 1968); *Nelson v. Heyne*, 491 F.2d 352, 354-357 (CA9 1974). While this Court early recognized that the Eighth Amendment stood as a barrier against "torture," *Wilkerson v. United States*, 99 U.S. 130, 136 (1879), and other excruciating forms of physical punishment and also prohibited "the unnecessary infliction of physical pain in the execution of the death sentence," *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947), it declared that the Amendment's protections did not forbid infliction of the pain inevitably involved in "the mere extinguishment of life," *Ex parte Kemmler*, 136 U.S. 436, 447 (1890).[43] However, an arbitrary and capricious application of the penalty is

[42]*See generally*, West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 694 (1975); Gallemore & Panton, *Inmate Responds to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167, 168-170 (1972); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 826-831 (1972). *Cf.* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962). Two defendants, condemned under post-*Furman* statutes, have committed suicide while awaiting appellate disposition of their cases. *State of Florida v. Walter Albert Carnes*, November 19, 1974, Duval County Circuit Court No. 74-2131 CF (Div. S), *Carnes v. State*, Florida, Sup. Ct. No. 46,673, *appeal dismissed*, July 16, 1975, 316 So.2d 292; *State of Texas v. John H. Devries*, conviction of capital murder, January 23, 1974, Jefferson Country District Ct. Nos. 31,085, 31,086, cases dismissed on motion of State, November 17, 1975.

[43]"[I]f the punishment prescribed for an offense against the laws of the State were . . . burning at the stake, crucifixion, breaking on the wheel or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." *Ex parte Kemmler* 136 U.S. 436, 446-447 (1890).

something more and vastly different than the mere extinguishment of life,[44] and invokes the "[p]rohibition against the *wanton infliction* of pain [that] has come into our law from the Bill of Rights of 1688." *Louisiana ex rel. Francis v. Resweber, supra,* 329 U.S. at 463 (emphasis added).

Finally, we suggest it is no accident that capital punishment is administered through procedures which are despairingly insufficient to preserve any reasonable expectation of an equitable, nonarbitrary application of the penalty. These procedures plainly manifest the atrocity and the basic irrationality of the punishment of death. *Because* the common consensus in our society regards death as too extreme a penalty for regular or even-handed use in even the narrowest class of generically-defined cases, it has proved impossible legislatively to prescribe objective categories of offenders for whom the penalty can be tolerated without wholesale evasion.[45] Thus we must and do use a host of evasive mechanisms to winnow the ranks of the condemned upon the basis of *ir*regular, *non*objective and *non*even-handed criteria.

Because the death penalty bears no rational relation to any legitimate penal or social objective, it is impossible to construct a rational system for its administration. Any attempt must necessarily fail to devise a reasoned selective scheme for the application of a fundamentally unreasoned sanction. In what cases is it appropriate to apply a punishment which is equally

[44]*See* BLACK, *op. cit. supra* note 22, at 95.

[45]*See McGautha v. California,* 402 U.S. 183, 204-207 (1971); Brief for the United States as *amicus curiae* in *Fowler v. North Carolina,* No. 73-7031, at pp. 59-61.

purposeless in all cases? The problem goes to the root of the death penalty. It is reflected in Sir Ernest Gowers' conclusion after chairing the most systematic and extensive Twentieth Century inquiry into the subject:

> "Before serving on the Royal Commission . . . I should probably have said that I was in favour of the death penalty, and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study . . . gradually dispelled that feeling. In the end I became convinced that . . . so far from the sentimental approach leading into [the abolitionists'] . . . camp and the rational one into that of the supporters, it was the other way about."[46]

Capital punishment is *innately* sentimental and anti-rational.[47] Its incoherent and invidious applications are not merely the price we pay for having it; they are the sole commodities purchased for the price. There exist no coherent or non-invidious reasons for choosing anyone to inhale gas or undergo electric shock until he is dead.

In this case and its companion cases, the respective States (and the federal Government as *amicus curiae*) are essentially asking the Court to allow them to conduct further experiments in the practice of killing people which the national experience of this century has shown to be (1) an absolute penological failure,[48] (2) so abhorrent to contemporary American processes of justice that the discretionary operation of those

[46]GOWERS, A LIFE FOR A LIFE 8 (1956).

[47]*See, e.g.,* BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 31 (2d ed. 1951).

[48]*See* Petitioner's *Fowler* Brief, at pp. 121-130 and Appendix E; Petitioner's *Fowler* Reply Brief, at pp. 17-19 and Appendices C and E; Appendix 3 to the present brief, *infra.*

processes has demonstrated its repudiation in the most eloquent possible manner, by sparing from execution all but a "bare sample of the culprits whose conduct [made] . . . them eligible for [it],"[49] and (3) the source

[49]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 252-253 (1961). Professor Wechsler speaks here of the death penalty at a time (1930-1959) when it was used far more frequently ("with executions ranging from 199 to 48," *id.* at 252) than it is used today. Subsequent commentators concur in describing a precipitous decline in the actual use of the penalty, to a point where "[t]he most salient characteristic of capital punishment is that it is infrequently applied," PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967). *See, e.g.*, II NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1350-1351 (G.P.O. 1970) ("a de facto abolition has practically become a reality in the United States"); Sellin, *Executions in the United States*, in SELLIN, CAPITAL PUNISHMENT 31, 34 (1967); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1791-1792 (1970); Reckless, *The Use of the Death Penalty A Factual Statement*, 15 CRIME & DELINQ. 43, 50 (1969). The total number of persons executed under civil authority in the United States in each of the following represenative years and five-year periods was:

1930	155	1930-1934	776
1935	199	1935-1939	891
1940	124	1940-1944	645
1945	117	1945-1949	639
1950	82	1950-1954	413
1955	76	1955-1959	304
1960	56	1960-1964	181
1965	7	1965-1969	10
1970	0	1970-1974	0

Source: UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974*, Table 1, pp. 16-17 (November 1975).

This American development is, of course, consistent with the "phenomenal decline" of executions on a world-wide scale,

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of an always arbitrary[50] and frequently discriminatory[51] infliction of death that can decently be viewed only as an enduring cause of national shame. But the death

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Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 408 (1965), which we have described in Appendix D to Petitioner's *Fowler* Brief.

[50]*See Furman v. Georgia, supra.*

[51]Racial discrimination in the application of the death penalty for rape has been sufficiently blatant to allow of overwhelming statistical proof.

> "Over two dozen possibly aggravating nonracial variables that might have accounted for the higher proportion of blacks than whites sentenced to death upon conviction of rape have been analyzed. Not one of these nonracial factors has withstood the tests of statistical significance. That is, in none of the seven states carefully analyzed can it be said that any of the nonracial factors account for the statistically significant and disproportionate number of blacks sentences to death for rape. . . . All the nonracial factors in each of the states analyzed 'wash out,' that is, they have no bearing on the imposition of the death penalty in disproportionate numbers upon blacks. The only variable of statistical significance that remains is race.
>
> ". . . [S]entences of death have been imposed on blacks, compared to whites, in a way that exceeds any statistical notion of chance or fortuity. . . . [W]ith the benefit of a carefully designed and objectively analyzed study of [control] . . . conditions, it can be concluded that the significant racial differentials found in the imposition of the death penalty are indeed produced by racial discrimination."

Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119, 132-133 (1973).

A similarly overwhelming comprehensive demonstration of racial discrimination has concededly not yet been made in connection with the death penalty for murder. This is hardly surprising, in light of (1) the costs and difficulties of undertaking the sort of elaborately controlled and exhaustive study done by Wolfgang and Riedel in rape cases, and (2) the over-all rarity of use of the death penalty, coupled with its application through procedures

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penalty in any form is no longer an experiment: it is an ancient exercise in savagery that has run its course. The time is too late now to rectify the errors of the past;

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(and with results) whose irregularity resists reduction into patterns that might serve as controls for a study of the racial factor, *see* notes , *supra;* note *infra.* But, if racial discrimination in death sentencing for murder has not been conclusively proved, there is at least very strong evidence of it in (A) the concurrence of results among several limited empirical studies that have been done, *see* Petitioner's *Fowler* Brief, pp. 136-137 n.226; (B) the coincidence of those results with the impressions of knowledgeable and responsible observers, *ibid.;* (C) the appearance in the rape studies of the same "indigent/non-indigent" racial sentencing pattern observed in murder cases, *see* Bullock, *Significance of the Racial Factor in the Length of Prison Sentences,* 52 J. CRIM. L., CRIM. & POL. SCI. 411 (1961) – that is, the tendency to treat black defendants disproportionately harshly *if* their victims are white, *see* Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia,* 45 AM. J. ORTHOPSYCHIATRY 658 (1975); and (D) the intuitive implausibility of the hypothesis that the same people, operating through the same procedures in rape and murder cases, have practiced racial discrimination in the rape cases but risen scrupulously above its influence when the charge is murder.

Indeed, in a recent study of 142 post-*Furman* death sentences imposed after murder convictions in the States of Florida, Georgia, Louisiana, North Carolina, Oklahoma, and Texas, Professor Riedel has noted that 87% of these cases involved victims who were white. Riedel, *Death Row 1975: A Study of Offenders Sentenced Under Post-Furman Statutes,* 49 TEMPLE L. Q. 261 (1976). [We are informed by the editors of the Temple Law Quarterly that this article will appear in March, 1976.] *Compare* Klebba, *Mortality Trends for Homicide, by Age, Color and Sex: United States, 1960-1972* (National Center for Health Statistics, Division of Vital Statistics, 1974) at 2-3 (more than half of the total number of homicide victims during 1972 were nonwhite).

such, of course, is the nature of capital punishment. It is not too late – nor is it too early – to prevent the repetition of those errors in the future.[52] Legitimate experimentation with new penological methods is

[52]The evidence described in footnote 46 *supra* allows no comforting explanation of the obvious fact that historically "Negroes [have been] . . . executed far more than whites in proportion to their percentage of the population," *Furman v. Georgia, supra,* 408 U.S. at 364 (concurring opinion of Mr. Justice Marshall). *See also* the additional authorities collected in *id.* at 364-365 n.152. Against this background, it is sobering to note that the percentage of nonwhites in the death row population according to the latest officially reported count (December 31, 1974) was not significantly different than their percentage in the official count of December 31, 1971, just preceding *Furman.* Prior to *Furman,* nonwhites comprised 329 out of a total of 620 inmates (that is, 53.1%). UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-1, *Capital Punishment 1971-1972,* Table 10, pp. 39-40 (December 1974). On December 31, 1974, nonwhites comprised 138 out of a total of 254 inmates (that is, 54.3%). UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974,* Table 16, pp. 44-45 (November 1975).

These figures might seem to imply that the percentage of nonwhites sentenced to death pursuant to post-*Furman* death-sentencing procedures has not declined as compared with the percentage sentenced to death under the avowedly discretionary pre-*Furman* death sentencing procedures. That conclusion appears correct; but we do not wish to leave the impression that the NPS figures support it, since we are factually advised that they do not. The NAACP Legal Defense and Educational Fund, Inc., maintains an independent roster of death-row inmates, and we therefore know that the figure of 254 persons listed by NPS as "under sentence of death" on December 31, 1974, includes a considerable number of inmates sentenced to die before *Furman* whose sentences had not yet (for various reasons) been technically vacated, although they could no longer constitu-

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unquestionably desirable,[53] and the limits set upon it by the Constitution[54] must necessarily be not too confining.[55] Nevertheless, the limits of the Eighth Amendment are exceeded when the subject of the exercise is extermination of human life and when its results can be foredoubted only by the blindest self-delusion.

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tionally be carried out. Our figures do support the same conclusion, however. They were last systematically updated on January 2, 1976, at which time we were aware of 411 death-row inmates sentenced after *Furman* and knew the race of 381 of them. Among the 381, nonwhites numbered 236 (61.9%), while whites numbered 145 (38.1%). Thus, even on the extremely unlikely assumption that *every* death row inmate whose race was unknown to us was white, nonwhites comprised (on January 2, 1976) 57.4% of persons held under death sentences imposed pursuant to post-*Furman* procedures, as compared with 53.1% of persons held (on December 31, 1971) under death sentences imposed pursuant to pre-*Furman* procedures.

[53]This is why one of the tragic features of capital punishment is its tendency to absorb public attention through sensationalism while simultaneously providing a political placebo for the fear of crime. As a result, legislative and administrative failures to pursue real and realistic solutions to the complex, difficult problems of controlling criminal behavior are ignored. *Cf.* West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 692-693 (1975).

[54]*See, e.g., Robinson v. California*, 370 U.S. 660 (1962); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *and see* Justice Jackson's concurring opinion in *id.* at 546-547:

> "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality . . . of a minority – even those who have been guilty of . . . crime."

[55]*See, e.g., Tigner v. Texas*, 310 U.S. 141 (1940).

Can there be doubt what a resumption of capital punishment in this country will show? During another couple of generations, a freakishly selected quota of offenders[56] will be killed after much agonizing and in

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[56]*See Furman v. Georgia, supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart). Freakish selection continues to be inevitable under procedures such as those described in Parts II of this brief and of Petitioner's *Fowler* Brief, wherein a large number of decisionmakers (many of them operating in only one or a very few cases) make innumerable life-or-death decisions through the resolution of vaguely defined issues whose relation to the choice of life or death is problematic. In this setting, any regularity of results is made impossible by the basic obscurity of the reasons for inflicting capital punishment, and the consequently wide variability of views regarding the cases (if any) in which the death penalty is tolerable. Issues of this nature peculiarly call into play "the natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion," BLACK, *op. cit. supra* note , at , especially when the differences between the possible conclusions – to kill a human being or to let him live – are out of all proportion to the legal and factual distinctions upon which they turn, *see* KALVEN & ZEISEL, *op. cit. supra* note , as quoted therein. Prejudice and discrimination are also most likely to prevail in this setting. *See* note *supra;* Petitioner's *Fowler* Reply Brief, at pp. 12-14. But freakish (if not discriminatory) results are assured even upon the assumption that every individual involved in the decision of capital cases always and unfailingly acts with the utmost conscientiousness and good will. *See* BLACK, *op. cit. supra* note 22, at 94. For death is too extreme and extraordinary a penalty for conscientious, well-intentioned persons in our society to decree through solemn judicial proceedings without first making an intensely-felt condemnatory judgment that permits them to suspend their sense of common human brotherhood with the prisoner. The collision of such strong emotions as the need to express outrage at a criminal atrocity and abhorrence of participating in a legal one cannot possibly produce a coherent or consistent pattern of such judgments. As different decisionmakers differ in their reactions to the gravity of the responsibility that they hold and the imponderability of the decision that they are obliged to make, so, too, will their particular judgments differ. *Id.* at 16-17, 21, 46-47, 49-50.

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progressively diminishing numbers until the death penalty falls of its own weight or until its last remnants are judicially condemned upon evidence of its historical

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Three consequences follow. (1) Within any group of indistinguishable offenders (*i.e.*, those whose offenses and personal characteristics differ only in details that no rational mind could deem relevant to a choice of punishment), some will be killed and some will be spared. (2) The decision to kill or to spare *distinguishable* offenders will be made haphazardly because differing prosecutors, judges, juries and governors will choose differentially to act upon or to ignore available distinctions among the offenses or personal characteristics of these offenders, *See, e.g.*, KALVEN & ZEISEL, *op. cit. supra* note 31, at 438-439, 444; and the same characteristic (intoxication, drug addiction, mental abnormality short of insanity, prior relations between the defendant and victim, etc.) may arouse the sympathy of one decision-maker and the antipathy of another. (3) Even distinctions that are repeatedly made in the selection of offenders to live or die need not conform to the legislative purposes for authorizing capital punishment or to the justifications for capital punishment which are now being urged upon this Court in support of its constitutionality; and the fact that a distinction is frequently made (or that a factor is commonly given decisive weight in the selection of defendants to live or die) does *not* mean that the distinction (or the factor) will not be inexplicably and capriciously ignored by particular decision-makers in particular cases, *see id.* at 435-444; Note, *A Study of the California Penalty Jury in First Degree Murder Cases*, 21 STAN. L. REV. 1299, 1420 (1969). In all of these regards, nothing has changed since *Furman. See* Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 661-662 (1974), quoted in Petitioner's *Fowler* Brief, at pp. 44-45; White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 DUQ, L. REV. 279, 289 n.69 (1974). *See also Morgan v. State*, Tenn. Ct. Crim. App. No. 492 (Hamilton County), decided January 30, 1976, slip opinion at 9 (opinion of Russell, J.):

> "The Tennessee statutes providing for the death penalty for first degree murder . . . facially make the punishment

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repudiation that can scarcely be clear than now. But what earthly purpose can these deaths serve?

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> mandatory. This, however, is but a sham of the clearest transparency. All charges of first degree murder include second degree (as well as other lesser included offenses); and the legislature increased the maximum punishment for second degree murder to life. With all respect to my brethren who held in *Collins v. State* . . . that our death penalty statute is constitutional, in that very case, wherein the defendant was charged with two first degree murders committed at the same time and in substantially the same way, the jury found one of them to be first degree, setting death by electrocution, and found the other to be second degree, setting a ninety-nine year prison sentence.
>
> "I have no empirical data on the history of the use of this relatively new (1974) statute, but the half dozen or so death penalty appeals that have reached panels of this court that I have sat upon demonstrate clearly (1) that it is not being regularly set in murder cases, and (2) some of the cases, like *Collins*, are internally inconsistent. One pending case involves a felony murder in which two of the three defendants were found guilty of first degree murder and sentenced to death, while the third was convicted of only voluntary manslaughter for his participation in the same robbery-murder."

In the *Morgan* case, a panel of the Tennessee Court of Criminal Appeals (with one dissenter) held Tennessee's 1974 death-penalty statute (described in Petitioner's *Fowler* Brief, at App. A, pp. 57a-58a) unconstitutional under *Furman v. Georgia, supra*, because, although "mandatory" in form, it was administered through discretionary mechanisms such as we have described in Parts II of this brief and of Petitioner's *Fowler* Brief. As noted in the passage of Judge Russell's opinion just quoted, another panel of the same court sustained the constitutionality of the statute in *Collins v. State*, Tenn. Ct. Crim. App., No. 63 (Hamblen County), decided September 26, 1975; and the issue is now before the Supreme Court of Tennessee.